Before The
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and	)	WT Docket No. 96-18
Part 90 of the Commission's	)	
Rules to Facilitate Future	)	
Development of Paging Systems	)	
	)	
Implementation of Section	)	PP Docket No. 93-253
309(j) of the Communications	)	
Act -- Competitive Bidding	)	

To: The Commission

CONSOLIDATED PETITION FOR RECONSIDERATION

Filed on Behalf of:

ROBERT KESTER, ET AL.

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Dated: March 26, 1997

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Summary

Robert Kester, *et al.* ("Petitioners"), are requesting reconsideration of the actions taken in the *Second Report and Order and Further Notice of Proposed Rulemaking* ("*Order*") issued by the Commission in the above-referenced proceeding. The Commission, through its *Order*, has established geographic area licensing of paging licenses and established competitive bidding procedures which require the dismissal of all mutually exclusive applications currently pending before the Commission. The Petitioners urge that the use of competitive bidding rules at this late stage of the proceeding is arbitrary and capricious. Insofar as the proposed rules would bar the processing of applications which were properly filed under the Commission's own pre-existing rules, the proposed rules impose an unjustifiable retroactive effect on those previously-filed applications. In addition, Commission precedent in at least three recent cases, where licensing eligibility was limited to pending applications bars the dismissal of the Petitioners' applications here. Furthermore, the use of the Commission's "chain-reaction" processing standard is improper as it relates to the requirements of the Paperwork Reduction Act, and is being improperly applied in the Commission's paging processing algorithm to determine mutual exclusivity in the case of 931 MHz paging applicants. The Commission has also incorrectly considered the value of paging frequencies as the basis for implementing auction rules. Finally, the public interest requires that, at a minimum, the Commission grandfather existing pending applicants and restrict eligibility for any auctions to these pending applicants.

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To: The Commission

CONSOLIDATED PETITION FOR RECONSIDERATION

Robert Kester, *et al.* ("Petitioners"),[1] herewith request, pursuant to Section 1.106 of the Commission's Rules, reconsideration of the actions taken in the *Second Report and Order and Further Notice of Proposed Rulemaking* ("*Order*") issued by the Commission in the above-referenced proceeding.[2] The Commission, through its *Order*, has established geographic area licensing of Common Carrier Paging (CCP) and 929 MHz Private Carrier Paging (PCP) and established competitive bidding procedures for auctioning mutually exclusive licenses by dismissing any such applications currently pending before the Commission. The Petitioners have

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[1] The 931 MHz paging applicants listed in the attached Exhibit One have filed applications which are currently pending before the Commission, and which will be directly and adversely affected by the Commission's auction rules established as described herein. Thus, they have standing to file this Petition For Reconsideration.

[2] The date of public notice for the purpose of filing this Petition for Reconsideration is the release date, February 24, 1997. See 47 C.F.R. Section 1.4(b)(3). Consequently, this Petition for Reconsideration is timely filed.

currently pending license applications before the Commission for more than a year. Consequently, the imposition of the competitive bidding rules at this late stage is arbitrary and capricious. Insofar as the proposed rules would bar the processing of applications which were properly filed under the Commission's own pre-existing rules, the proposed rules impose an unjustifiable retroactive effect on those previously-filed applications. Furthermore, the use of the Commission's "chain-reaction" processing standard violates the Paperwork Reduction Act, and is being improperly applied to determine mutual exclusivity in the case of 931 MHz paging applicants. In addition, the new licensing rules violate the provisions of the Communications Act which bar the consideration of the value of frequency as the basis for implementing auction rules, as well as other statutory objectives of those portions of the Act. Finally, the failure to grandfather existing pending applicants and restrict eligibility for any auctions to these pending applicants violates Commission precedent and is otherwise arbitrary and capricious. In support of this Petition for Reconsideration, the following is submitted.

I. Background

In its *Order*, the Commission adopted rules governing geographic area licensing of Common Carrier Paging (CCP) and 929 MHz Private Carrier Paging (PCP), and competitive bidding procedures for auctioning mutually exclusive applications for these licenses. After proposing a transition to geographic area licensing for CCP and PCP channels, and competitive bidding

procedures for resolving mutually exclusive applications for these licenses in its *Notice of Proposed Rulemaking*,[3] the Commission adopted geographic area licensing and competitive bidding procedures for paging. The Commission stated that all mutually exclusive applications for non-nationwide 931 MHz channels and exclusive non-nationwide 929 MHz channels will be subject to competitive bidding for geographic area licenses for 51 Major Trading Areas (MTAs).

Furthermore, the Commission stated that all pending mutually exclusive applications for paging licenses filed with the Commission on or before the adoption date of this Order will be dismissed. All non-mutually exclusive applications filed with the Commission on or before July 31, 1996 will be processed. All applications (other than applications on nationwide and shared channels) filed after July 31, 1996 will be dismissed.

The Petitioners all filed their 931 MHz paging applications which are the subject of this Petition for Reconsideration between November 15, 1995, and February 8, 1996, at which time the Commission imposed a filing freeze for any future-filed applications.

II. Standard of Substantive "Arbitrary and Capricious" Review

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, expressly vests a reviewing court with the right to hold

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[3] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996)(*Notice*).

unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA particularly proscribes the failure to draw reasoned distinctions where reasoned distinctions are required.[4] An agency is required to take a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action.[5] A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious. *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993). An agency changing its course must supply reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms. *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (D.C. Cir. 1986). See also *Achernar Broadcasting Co. v. FCC*, 62 F. 3d 1441 (D.C. Cir. 1995) (the Commission must fully articulate a new policy if it has truly adopted one).

III. The Commission Must Follow Its Own Rules

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[4] *American Trucking Associations, Inc. v. I.C.C.*, 697 F. 2d 1146, 1150 (D.C. Cir. 1983).

[5] *Neighborhood Television Co. v. F.C.C.*, 742 F. 2d 629, 639 (1984); *Telocator Network v. F.C.C.*, 691 F. 2d 525, 545 (D.C. Cir. 1982) (agency must consider all relevant factors); *Action For Children's Television v. F.C.C.*, 564 F. 2d 458, 478-79 (D.C. Cir. 1977) (agency must give relative factors a "hard look").

It is a well-settled rule of law that an agency must adhere to its own rules and regulations.[6] In addition, once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar.[7] It is patently unfair to allow disparate treatment of similarly-situated applicants, as the Commission is attempting to do here with 931 MHz paging applicants.[8]

IV. Compliance with the Paperwork Reduction Act of 1980.

The Paperwork Reduction Act of 1980 ("PRA") requires agencies to obtain approval from the Office of Management and Budget ("OMB") before imposing a new or revised information collection requirement.[9] Proposed rules are submitted to OMB and may be approved and assigned an OMB control number prior to adoption and publication of the final rules.[10] The final rules need only be submitted to OMB if they have been "substantively or materially" modified after approval by OMB as proposed rules.[11] The "public

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6 "A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations"

Reuters Ltd. v. F.C.C, 781 F. 2d 946, 947, 950 (D.C. Cir. 1986). See also *Schering Corp. v. Shalala*, 995 F. 2d 1103, 1105 (D.C. Cir. 1993).

7 *Green County Mobilephone, Inc. v. F.C.C*, 765 F. 2d 235, 237 (D.C. Cir 1985).

8 *Melody Music, Inc. v F.C.C.*, 345 F. 2d 730 (D.C. Cir. 1965).

9 See 44 U.S.C. § 3507(a).

10 See C.F.R. § 1320.13(f).

11 See 5 C.F.R. § 1320.13(G).

protection" provision of the PRA provides that "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved...does not display a current control number assigned by the Director (of OMB).[12]

V. The Ashbacker Doctrine

It is well-settled that where there are two or more competing applications for a radio license, both are entitled to be heard before a grant is made. *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945).[13] The Supreme Court has found that the standard of allocating spectrum according to the "public interest, convenience and necessity" established in Section 309 of the Communications Act, 47 U.S.C. § 309, is governed by comparative considerations as to the services to be rendered.[14]

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[12] 44 U.S.C. §3512.

[13] In Ashbacker, the Commission was faced with two mutually exclusive applications. It granted one, while designating the application of Ashbacker Radio Corp. for hearing. The Supreme Court reversed, stating:

> "We do not think it is enough to say that the power of the Commission to issue a license on findings of public interest, convenience and necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing... . We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

Id., at 330.

[14] National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943).

VI. Mutual Exclusivity Standard

The Commission has established a definition of mutual exclusivity for paging applications in its rules. The primary definition of mutual exclusivity is found in 47 C.F.R. Section 22.131, based on interference considerations:

> Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved.

Traditionally, the Commission has imposed a "chain-reaction" principle to determine mutual exclusivity.[15] However, the Commission's rules are designed to prevent the procedural problems caused by an indefinite "chain reaction".[16] This "chain-reaction" principle is not specifically described in the Commission's rules.

The Commission implements its mutual exclusivity rule through the use of an algorithm designed for automatically granting or dismissing 931 MHz applications.[17]. The algorithm does not appear to incorporate the "chain reaction" processing principle traditionally used in the processing of paging applications.

VII. The FCC's New Licensing Rules Are Improper

A. Auction Rules Are Impermissibly Retroactive

The Commission's action with respect to applications filed in

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[15] *See Domestic Public Radio Services*, 38 RR 2d 363, 374 (1976).

[16] *Id.*, at 375.

[17] A copy of the algorithm is attached in Exhibit One.

accordance with existing FCC Rules is unfair and constitutes an unreasonable retroactive application of the Commission's own Rules. It is well-settled that the retroactive application of administrative rules and policies is looked upon with great disfavor by the courts.[18] When implementing regulations or policies and procedures with retroactive application, the Commission must balance the "mischief" caused by such regulation against the "salutary" or beneficial effects, if any, which reviewing courts, in turn, must critically review on appeal to ensure that competing considerations have been properly considered.[19]

The retroactive application of auction rules to pending 931 MHz paging applications, filed as they were in accordance with the Rules and policies of the Commission then in effect at the time of filing, does not comply with the policy just articulated. The Commission's action does not appropriately strike the balance between the significant mischief of disrupting the normal and routine 931 MHz paging licensing process and depriving applicants of their rights and equitable expectancies, versus the dubious benefit of auctioning spectrum which, as the Commission itself has

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[18] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988)(retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.")

[19] *Yakima Valley Cablevision*, 794 F. 2d 745-46; *See Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947).

admitted in the *Notice of Proposed Rulemaking* in this proceeding[20], is already heavily licensed.

The rules have an impermissible retrospective effect and the auction rules constitute a "rule" under the APA.[21] Thus the auction rules' legal consequences must be wholly prospective, unless Congress expressly conveyed the power to promulgate retroactive rules to the Commission.[22] The Communications Act conveys no such express power, and no other statutory basis for such power is cited in the *Order*. Thus the Commission's attempt to impose retroactive auction rules is illegal.

VII. Auction Rules Violate Communications Act

A. The Commission Cannot Consider Value of Licenses To Be Auctioned

The Commission's imposition of auction rules and the dismissal of pending applications is based on improper assumptions barred from consideration by the specific language of the Communications Act. The Commission is improperly using the desire to raise money

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[20] See *Notice*, at ¶13 ("According to our records, CCP channels are heavily licensed, particularly in major markets.")

[21] The APA's definition of a "rule" states in pertinent part that a rule

> means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...

5 U.S.C. §551(4) (emphasis added).

[22] *Bowen v. Georgetown University Hospital*, 488 US 204, 208 (1988) (retroactive rulemaking prohibited unless authorized by statute).

for the United States Treasury as the basis for the auction rules. Second, the auction scheme further violates other provisions of the Communications Act which establish the criteria for implementing auction rules.

Section 309(j)(7)(A) of the Communications Act provides that, in making a decision to prescribe area designations and bandwidth assignments:

> ... the Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (emphasis supplied)

It is manifestly clear that the Commission is doing just that here. Dismissing pending applications for CCP channels will obviously crate more available channels prior to auction. The more channels available, the more valuable the geographic area being auctioned becomes. This Commission action thus penalizes applicants already properly on file in favor of potential, as yet unidentified bidders for paging licenses.[23]

The Commission specifically states in ¶13 of the *Notice* that "there is relatively little desirable spectrum that remains available for licensing" on VHF and UHF paging channels in the 152

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[23] In fact, since the Commission is forbidden by statute to consider the revenues generated by auctions when instituting competitive bidding rules for a service, there is no reason why the Commission should dismiss the pending 931 MHz paging applications at all. The Commission could simply utilize auctions for those applications which are in fact mutually exclusive. Seen in this light, the only reason for the dismissal of any applications is to increase the "value" of the paging spectrum for future bidders, and to attempt to increase federal revenues from auctions in impermissible fashion.

and 454 MHz bands.[24] Substitute the term "valuable" for "desirable", a reasonable synonym in this context, and the Commission's consideration of the worth of the spectrum in establishing its rules in this proceeding is clear.

B. The Commission Contravenes Other Statutory Objectives

In addition to the foregoing, instituting paging auctions further contravenes the letter and spirit of the competitive bidding provisions in the Communications Act. Specifically, these provisions list statutory objectives such as the following:

1. "[D]evelopment and rapid deployment of new technologies, products and services.. without administrative or judicial delays.." See 47 U.S.C. § 309(j)(3)(A). Paging is not a new service -- rather, by the Commission's own admission -- it is a mature industry.[25] Auctioning paging licenses to entirely new parties to the proceeding at the expense of pending applicants will not bring any "new technology, products or services" to the public.

2. "[P]romoting economic opportunity and competition.. and disseminating licenses among a wide variety of applicants." See 47 U.S.C. § 309(j)(3)(B). Paging is already a highly competitive industry, as the FCC itself has observed in the *Notice*. (See footnote 27, *supra*.) Licenses are already "disseminated among a wide variety of applicants", as there are numerous paging operators in nearly all markets. Furthermore, existing applicants have

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[24] The Commission notes that channels in the 931 MHz band "also are scarce in virtually all major markets and most mid-sized markets." *Notice* at ¶14.

[25] See *Notice*, ¶¶ 4-8.

already specifically demonstrated their desire to participate in the paging business by expending significant resources in the preparation and filing of their applications. This in and of itself will without doubt promote economic opportunity and competition in the paging industry, as these new participants are issued licenses and allowed to build paging stations.

VIII. Commission Precedent Bars Dismissal of Applications

The Commission's proposed Rules are also a radical departure from the practice established in three recent Commission decisions.[26] In each case, the Commission decided that, rather than dismiss mutually exclusive applications, it would grandfather them into the licensing process and conduct lotteries with respect to the first two decisions, and conduct auctions with respect to cellular unserved area applications in the last decision. In all three cases, the Commission limited eligibility in the licensing process to those applicants whose applications were already on file with the Commission.[27]

The Commission's unexplained failure to follow its own

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[26] *Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules)*, 10 FCC Rcd 9589 (1995) ("MDS Order"); *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Order"); and *Ninth Report and Order* in PP Docket No. 93-253 and CC Docket No. 90-6, released November 7, 1996 ("Cellular Unserved Order II").

[27] In the *Ninth Order*, the Commission limited eligibility to participate in the auction to unserved area cellular applicants already on file, stating that

> These auction rules will serve our goals of providing service to the public expeditiously, ensuring that all qualified applicants have an opportunity to compete for a license, and deterring the submission of speculative applications. *Ninth Order*, at ¶5. (Emphasis supplied.)

procedures in this case is contrary to law. A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious.[28] Once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar.[29] The failure of the Commission to grandfather the pending paging applicants into the proposed auction, presuming such auction is even appropriate, is therefore arbitrary and capricious.

The Commission's specific language in its decision to implement lotteries for the Multipoint Distribution Service underscores the arbitrary nature of the Commission's licensing rules here.[30] Commissioner Quello says quite forcefully and persuasively:

> The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and the rules at that

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[28] *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993).

[29] *Green County Mobilephone, Inc. v. F.C.C*, 765 F. 2d 235, 237 (D.C. Cir 1985).

[30] *MDS Order*, supra, at 9754-57.

time.

Id., at 9754.

As the foregoing language illustrates, procedural fairness requires that the Commission at least limit the auction process to any applications for paging facilities that were on file prior to the imposition of the new auction rules. These applicants followed the Commission's Rules, and expended significant efforts and resources in the preparation of their applications, including engineering studies and legal review. The result of the Commission's instant *Order* will otherwise result in the arbitrary and capricious dismissal of the subject applications.

IX. The Mutual Exclusivity Rules Violate The Paperwork Reduction Act of 1980

As noted above, the Paperwork Reduction Act of 1980 ("PRA") requires agencies to obtain approval from the Office of Management and Budget ("OMB") before imposing a new or revised information collection requirement. The "public protection" provision of the PRA provides that

> "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved...does not display a current control number assigned by the Director (of OMB)."

A recent Commission decision has interpreted the statute to hold that the "public protection" requirements of the Paperwork Act may be raised as a complete defense or bar at any time during the administrative process.

The Petitioners cite this statute as a defense to the use of the "chain-reaction" principle to the processing of its

applications and any determination of mutual exclusivity. The Commission's rules only require studies within a certain geographic area.[31] The requirement that an applicant search beyond that area to determine if it is mutually exclusive using the "chain-reaction" principle prior to filing its application is an information collection requirement that cannot be condoned by the provision of the PRA just cited. The Commission must be barred from applying the "chain-reaction principle" in the determination of mutual exclusivity in this proceeding.

Furthermore, the use of the "chain-reaction principle" in the processing algorithm must be discontinued, if it is currently used, for this same reason.

X. The Ashbacker Decision Bars the Automatic Dismissal of Petitioners' Applications

The Communications Act of 1934, as amended, does not specifically provide for the filing of mutually exclusive applications for new radio facilities. The Commission was first apprised of the need for the establishment of rules for the orderly processing of applications in *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945).[32] According to the so-called "Ashbacker

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[31] See, e.g., 47 C.F.R. §22.559.

[32] "When the Supreme Court established the rule that mutually exclusive frequency applications must be given comparative consideration, it pointed out that no regulation of the Commission existed at that time 'which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date.'"

Century Broadcasting Corporation v. F.C.C, 310 F. 2d 864, 866 (D.C. Cir. 1962), citing *Ashbacker, supra*.

Doctrine" which has evolved from the *Ashbacker* decision, it is now well-settled that where there are two or more competing applications for a radio license, both are entitled to be heard before a grant is made. *Ashbacker Radio Corporation v. FCC*, supra.

In this situation, the Petitioners are in many instances mutually exclusive with licenses filed before July 26, 1993. The paging applications filed before that date are most certainly entitled to the award of licenses by lottery, based on the precedent cited earlier. For example the following language from the *MDS Order*, quoted extensively, illustrates this point clearly:

> By employing lotteries for pre-July 26, 1993 MDS applications, and by holding auctions for initial applications accepted for filing after that date, we adopt a straightforward approach that is easy to apply, fair to the applicants and serves the public interest.
>
> As previously noted by the Commission, the Budget Act's legislative history reflects Congress' recognition that equitable considerations and administrative costs may justify the use of lotteries for those applicants who, in reliance on the existing lottery procedures, had filed applications prior to July 26, 1993. *See Cellular Unserved Order* at 7391. In examining the equities and administrative costs at stake here, and based on the record before us, we believe that the public interest would be served by using a lottery to dispose of the relatively few remaining previously filed MDS applications for the handful of locations at issue. Indeed, we believe this situation presents facts that are precisely the type that warranted the grant of discretion to the Commission on this point. Specifically, with regard to equitable considerations, we note that most of these MDS applications on file have been pending for over four years due to the aforementioned processing delays, which were not the fault of the applicants. Particularly given this lengthy delay, we believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for BTA service areas, as they submitted their applications with the expectation of participating in a lottery for a site-specific conditional station license. Our decision will ensure that these pending applications will be processed under the rules in

effect at the time the applications were filed. It will also result in similar treatment for MDS applications filed within the same general time period....

Moreover, if the Commission were to require the previously filed MDS applicants to participate in an auction, it would be necessary to allow the applicants to submit the information required by the competitive bidding rules set forth herein. In contrast, a lottery would require no further submissions by the applicants, and could be conducted almost immediately, unlike an auction, which likely could not be held until the end of this year. Furthermore, in fairness to the previously filed applicants, those who indicate no desire to participate in an auction may be entitled to a refund of their application fees... In summary, we believe that it would be inequitable and administratively burdensome to require applicants for MDS station licenses, who filed their applications over four years ago in reliance upon the lottery procedures then in effect, to participate in an MDS auction.

...There is no evidence before us that these individual applicants, if awarded an MDS conditional station license by lottery, would not construct and operate an MDS station. These applicants did expend the time and the funds required to have their MDS station applications prepared and filed, and we have no evidence, on the record before us, to conclude that they will fail to construct an MDS station and provide service to the public...
Moreover, dismissal of these previously filed applications without prejudice to participate in a future BTA auction -- on the basis of a theory that the service for which the applicants previously applied either has changed significantly or no longer exists -- presents several potential drawbacks. Significantly, dismissal of these pending applications likely would engender reconsideration proceedings at the Commission and legal challenges in the courts. Such administrative and judicial delays could further postpone granting MDS licenses and providing service to the public, contrary to the public interest. In addition, while we are changing the conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection, we are not fundamentally changing the nature of the service. Licensees still will be providing wireless cable service to subscribers, albeit under altered conditions designed to make the service more competitive with cable television. Therefore, on the basis of this record, and considering the equitable and administrative factors identified above, we conclude, as we did in the Cellular Unserved Order, that the use of a

> lottery, rather than competitive bidding, to award MDS conditional station licenses to the remaining previously filed applicants would best serve the public interest.
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> *MDS Order*, supra, at 9631-32 (Emphasis supplied.)

Since, in all likelihood, these earlier filed applications should be exempted from treatment under the auction rules, the Commission's dismissal of any applications which are mutually exclusive with those applications without a hearing, i.e., without also being able to participate in the lottery, would violate the Ashbacker Doctrine.

XI. The Public Interest Requires Reconsideration

As noted by the Commission in its *Order*, and by Petitioners above, Section 309(j) of the Communications Act provides that, in developing competitive bidding procedures, the Commission shall fulfill various statutory objectives and consider several alternative methods for achieving them. The Commission specifically acknowledges:

> The statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall, inter alia, promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and <u>by disseminating licenses among a wide variety of applicants, including small businesses</u>, rural telephone companies, and businesses owned by members of minority groups and women." Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities." Section 309(j)(4)(D) also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." To meet the statutory objective of providing opportunities for designated entities, we have employed a wide range of special provisions and eligibility criteria in other

> spectrum- based services... Congress specifically cited the needs of small businesses in enacting Section 309(j) directing the Commission to promote economic opportunities for small businesses. Thus, while we agree that a number of small businesses are successfully participating in the paging industry, we conclude that it is appropriate to establish special provisions in our paging rules for competitive bidding by small businesses. (emphasis supplied.)

The irony here is that the Commission already has the opportunity to encourage the participation in this industry, avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants, including small businesses, by grandfathering existing applicants into any proposed auctions. As noted above, the Petitioners have already specifically demonstrated their desire to participate in the paging business by expending significant resources in the preparation and filing of their applications, and in their active participation in this proceeding.[33] It would be entirely unreasonable to dismiss these applicants, who have paid a great deal of money to participate in a licensing process already in place at the time of filing, requiring these applicants to lose their money because the Government has changed the rules in mid-stream.[34] This is

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[33] For example, Petitioners filed Comments in this proceeding, as well as a Petition for Reconsideration of the provisions of the *Notice* in this proceeding which imposed a filing freeze on new applications.

[34] The FTC and FCC both express dismay "where telemarketers sell application preparation services for wireless licenses for thousands of dollars to consumers, by claiming that telecommunications businesses will seek to lease or sell the licenses for many times the telemarketers' applications fees; and (2) "build-out" schemes, where telemarketers sell, again for thousands of dollars, interests in limited liability companies or partnerships that supposedly will acquire wireless licenses, build

entirely unreasonable, and clearly not in the public interest.

Wherefore, the above premises considered, it is respectfully requested that the Commission reconsider its decision to adopt geographic area licensing of paging licenses and establish competitive bidding procedures for auctioning mutually exclusive licenses and either issue license under current licensing procedures, or in the alternative, include Petitioners' application in any lotteries held with applicants filed prior to July 23, 1993. As a final alternative, the Commission should limit eligibility for any paging auctions to applicants currently on file and pending before the Commission.

Respectfully submitted,

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Dated: March 26, 1997

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and operate telecommunications systems, and pay the consumers high dividends." *Order*, at ¶11 and ¶219. By changing the licensing rules at this late date the government is unfairly punishing bona fide applicants who are entitled to equal consideration for licenses and the chance to develop service for the public.

EXHIBIT 1

Thomas Christinat
Dr. Robert Kester
Lee P. Andrews
Robert Wagner
Jerry Catt
James Brevard
Mark S. Swanson
Irv Kemp
Jeff Hengten
John A. Reimold
Melvia Woods
Barry Smith
David Bessy
John Piskor

EXHIBIT TWO